86-342

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

SULOCHANA MANDHARE,
Petitioner

VERSUS

W. S. LAFARGUE ELEMENTARY SCHOOL, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT and APPENDIX

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QUESTION PRESENTED

1. Did the Court of Appeal exceed its authority under Rule 52 of the Federal Rules of Civil Procedure in finding the factual decisions of the District Court finding employment discrimination on the basis of national origin "clearly erroneous", where the record showed and the trial court found:

(i) the defendant school board refused to rehire the petitioner even though she was recommended by the school system superintendent and the school board had never before refused to follow a recommendation of the superintendent to rehire a teacher;

(ii) during the private executive session of the school board the petitioner was openly described as a "foreigner";

(iii) the alleged reason that the school board did not rehire the plaintiff was that she had difficulty in speaking English even though she had a master's degree in education, lived in the U.S. for 18 years, and was state certified; and

(iv) the trial court heard petitioner testify and found the school board's explanation for not re-hiring petitioner a "feigned contention" and "unworthy of credence."

PARTIES

The parties to this proceeding are: Sulochana Mandhare and the LaFourche Parish School Board.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

SULOCHANA MANDHARE,

Petitioner

versus

W.S. LAFARGUE ELEMENTARY SCHOOL,
THE LAFOURCHE PARISH SCHOOL BOARD

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Sulochana Mandhare respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 2, 1986.

OPINIONS BELOW

The decision of the Court of Appeals, which is not reported, is set out at page 3a of the appendix. The order denying rehearing, which likewise is not reported, is set out at page 2a of the appendix.

The district court decision, not reported, is set out at page 13a of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1986. A timely petition for rehearing was filed, which was denied on May 28, 1986.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sect 1254 (1).

STATUTE AND RULE INVOLVED

Section 703 (a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sect. 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer - -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex, or national origin.

Rule 52 (a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

STATEMENT OF THE CASE

On March 9, 1983 petitioner commenced this action in the United States District Court.

Petitioner is a native of India who has resided in the U.S. for 18 years. She has a Masters in Education from Loyola University and was a state certified librarian for the defendant. Her complaint alleged that the defendant LaFourche Parish School Board had denied her reemployment because of her national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sect. 2000e et seq. Petitioner had previously filed a charge of discrimination with the Equal Employment Opportunity Commission, which had issued a determination finding reasonable cause to believe defendant had engaged in discrimination on the basis of national origin.

The case was heard at a non-jury

trial in December, 1984. Certain basic facts were not disputed. Mrs. Mandhare received her Masters of Education from Loyola University of New Orleans in 1972. During the school year 1978-79 she attended a Louisiana university, Nicholls State University, in order to complete the necessary requirements to receive state certification as a school librarian. The petitioner received certification from the State of Louisiana as a librarian.

After one year as a librarian in another parish, Mrs. Mandhare was hired as a librarian for the LaFourche Parish School Board for the 1980-81 school year and assigned to W.S. LaFargue Elementary School. The school consisted of grades kindergarten though second.

In July of 1981, the LaFourche Parish School Board decided not to rehire Mrs. Mandhare for the stated reason that

she had an accent and language problem which made it hard for students to understand her. The School Board refused to rehire her despite the recommendation of the school superintendent that Mrs. Mandhare be rehired as a librarian in a secondary school. The School Board had never denied a recommendation of the school superintendent before. During the executive session considering whether Mrs. Mandhare should be rehired, the conversation included a reference to the fact that Mrs. Mandhare is a "foreigner."

The trial presented conflicting evidence on two critical issues.

First, petitioner claimed that, although her English is not perfect, she was an effective communicator with her students. Petitioner presented the testimony of an expert witness, another teacher at her school and the stipulated testimony of four other teachers or

teacher aides at the school, that Mrs. Mandhare was not difficult to understand No one had ever complained to the teachers about any difficulty understanding Mrs. Mandhare. The defendant produced evidence indicating there were some complaints and contended petitioner was not qualified to be a librarian for little children because of her accent.

Secondly, the defendant contended that they did not follow the recommendation of the school superintendent to rehire Mrs. Mandhare as a secondary school librarian because they did not want to create a new position just for her. Petitioner presented evidence that: the decision-making process of defendant school board conducted in a closed executive-session included reference to Mrs. Mandhare being a "foreigner"; this was the first time the recommendation of

the school superintendent to rehire a teacher had ever been denied; the discussion in the executive-session centered around Mrs. Mandhare's abilities with small children, not her abilities in the recommended secondary school setting; and that the defendant school board after returning to public session, refused to even name Mrs. Mandhare as the only exception to the list of recommended rehired teachers.

The District Court resolved both of these factual disputes in favor of the plaintiff. In the Reasons for Judgment the trial judge called the refusal of defendants to follow the recommendation of the superintendent to re-hire Mrs. Mandhare "unfortunate" and characterized the failure to state petitioner's name in open session as the only non-hired recommended teacher after the closed "foreigner" discussion "a conspicuous

sheepish action." Further, the trial judge, after hearing among others the petitioner herself testify, ruled that the alleged communication problem because of her accent "a feigned contention."

The trial judge said that defendant's explanation of its motivation is "unworthy of credence" and ruled that plaintiff was entitled to relief under Title VII.

On appeal, the Fifth Circuit reversed as "clearly erroneous" each of the controverted factual findings of the district court. The lower court decision that the claims of communication problems were a "feigned contention", that the board's first-time refusal to follow the recommendation of its superintendent was "unfortunate", that the board discussed the petitioner as a "foreigner", that the public actions of the defendants were "sheepish", that defendant's explanation

of its motivation is "unworthy of credence", all the factual conclusions in the petitioner's favor in the trial court opinion, were held to be "clearly erroneous."

The Court of Appeals held that petitioner was not qualified to be an elementary school librarian and that there was no proof of discrimination in the Board's refusal to follow the superintendent's recommendation to rehire her in a junior high position.

A timely petition for rehearing was denied on May 28, 1986.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review the Court of Appeals decision which substituted its own version of the facts for the findings of the trial court in violation of Rule 52.

The decision of the Court of Appeals in this case disregarded the trial court's credibility findings on the two critical issues of the case, interpreted key facts in a different manner than the trial court, and improperly conducted a de novo weighing of the evidence in the record in violation of Rule 52 of the Federal Rules of Civil Procedure.

This Court's decisions in Pullman-Standard v. Swint, 456 U.S. 273 (1982) and Anderson v. Bessemer City, 470 U.S. _____ (1985), reemphasized Rule 52's requirement that factual findings be reversed on appeal only if clearly erroneous, and directed that that standard be applied in particular to findings of fact regarding the presence

of discriminatory motivation.

This Court of Appeals, like the Court of Appeals in Anderson v. Bessemer City, 470 U.S. _____(1985), invoked the Rule 52 clearly-erroneous standard in its decision. However, like the Court of Appeals in Anderson, supra, this Court of Appeals went on to substitute its interpretation of the facts and to initiate a de novo review of the evidence.

This Court recognized in Pullman-Standard v. Swint that the extent of compliance with Rule 52 must be ascertained by examining the actual decision of a Court of Appeals, not by reliance on a pro forma recitation of the "clearly erroneous" standard. 456 U.S. 291-93.

Review of this case is called for because the Court of Appeals made an independent determination on the issue of

discriminatory purpose contrary to the instructions of Rule 52. The importance of this case is in the fact that this action comes from the Fifth Circuit Court of Appeals, the same Fifth Circuit Court of Appeals that was admonished in Pullman-Standard v. Swint, (1982) not to make an independent determination of discriminatory purpose. 456 U.S. 285-6. This writ should be granted to point to courts of appeals, perhaps in a more pointed fashion, that an appellate court cannot exercise de novo review over factual findings of a trial court in violation of Rule 52.

The trial court found the allegations of the defendant about an inability to communicate on the part of petitioner "a feigned contention" after hearing the petitioner herself, experts on both sides, and teachers on both sides. (Page 22a).

Taken at face value, the words of the trial court indicate a finding of lack of credibility on the part of the defendant school board. The appellate court, however, found that Mrs. Mandhare was not qualified and that there was "no proof" that defendants discriminated against her in not rehiring her in either the elementary or junior high position. (Page 12a).

The trial court found defendant's explanation of its motivation "unworthy of credence." (Page 23a). The Court of Appeals, on the contrary, gave complete credence to the motivation of the defendant saying that the proof of non-discrimination is "without dispute." (Page 11a).

In such cases Rule 52 requires that consideration be given to the ability of the trial court to assess the credibility of the defendants. "Findings as to the

design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949). See also Anderson v. Bessemer City: "When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." at 470 U.S. _____(1985).

Petitioners acknowledge that, in a one-paragraph aside, the Court of Appeals appears to indicate a misperception of one of the issues in the case by the trial court. (Page 10a). In addition to the fact that the Court of Appeals itself goes on to address the same issue, it

should be noted that the Court of Appeals is in error. In paragraph 14 of her complaint, Mrs. Mandhare alleged that the defendant discriminated against her by denying her reappointment for the 1981-82 school year because of her national origin. The complaint is not limited to either the elementary or junior high librarian position but targeted to the fact she was not rehired.

The Court of Appeals makes much of defendant's contention that Mrs. Mandhare was not rehired because the school board would have to create a position for petitioner. However, this was a contention presented at the trial to the district judge.

The reasons for judgment by the trial court discuss the evidence about defendant's discussion of Mrs. Mandhare as a "foreigner", the fact that no previous recommendation of the

superintendent had been refused, and even characterized the board's actions as "sheepish." In conclusion, the court says:

"Defendant's explanation of its motivation is unworthy of credence." The judge simply did not believe the defendant's story. The judge believed the plaintiff and her witnesses.

When a trial court credits the testimony of one set of witnesses over another, and there are two permissible views of the evidence, there cannot be clear error sufficient to allow the Court of Appeals to overturn the finding. Anderson v. Bessemer City, 470 U.S. ____ (1985).

Defendant will no doubt argue that the decision of the Court of Appeals is a logical plausible interpretation of the facts. That is not the point. The issue for review is whether the district

court's decision was clearly erroneous. Fair review suggests it was not.

As a final note, it is important to recall the central factual dispute of this entire case - whether Mrs. Mandhare speaks well or not. The Court of Appeals never heard Mrs. Mandhare speak and yet pronounced her unqualified. The trial court listened to Mrs. Mandhare testify and found her qualified.

Rule 52 says listen to the trial court because he listened to Mrs. Mandhare. This Supreme Court must direct the Court of Appeals to listen to Rule 52.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85 3212

SULOCHANA MANDHARE,

Plaintiff-Appellee,
Cross-Appellant,

versus

W.S. LaFARGUE ELEMENTARY SCHOOL, ET AL.

Defendants,

THE LAFOURCHE PARISH SCHOOL BOARD,

Defendant-Appellant,
Cross-Appellee

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Appeal from the United States District Court for the Eastern District of Louisiana

- - - - - - - - - - - - - - - - - - -

ON PETITION FOR REHEARING

(May 28, 1986)

Before CLARK, JOLLY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-3212

SULOCHANA MANDHARE

Plaintiff-Appellee,
Cross-Appellant,

versus

W.S. LaFARGUE ELEMENTARY SCHOOL
ET AL.,

Defendants-Appellees,

THE LAFOURCHE PARISH SCHOOL BOARD,
Defendant-Appellant,
Cross-Appellee

Appeals from the United States
District Court for the Eastern
of Louisiana

(May 2, 1986)

Before CLARK, Chief Judge, JOLLY and HILL, Circuit Judges.

CLARK, Chief Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

The LaFourche Parish School Board and W.S. LaFargue Elementary School challenge an adverse judgment of the United States District Court for the Eastern District of Louisiana in a public school teacher employment discrimination action under Title VII. We reverse.

Sulochana Mandhare was employed as librarian at LaFargue Elementary School for the 1980-81 school term. The job required Mrs. Mandhare to perform administrative duties and tell stories to the elementary school children. Mrs. Mandhare experienced difficulty in the storytelling aspect of the job because she has a foreign accent which caused students and some teachers to have a hard time understanding her.

This problem was brought to her attention through observations and

evaluations by school officials, culminating in the year-end recommendation that she not be rehired for the following school year. Upon receipt of that recommendation, Jeffrey LeBlanc, the Superintendent of Schools for the parish, suggested that Mrs. Mandhare request a transfer to the first open library position at a higher grade level in which storytelling skills were not required. No vacancy developed prior to the Board meeting scheduled to consider contract renewals.

LeBlanc then recommended that the Board employ Mandhare as librarian at East Thibodaux Junior High School. There was, however, already one librarian in that school and no junior high school in the system had an assistant librarian position. The Board determined not to enter into a contract with Mandhare for

the 1981-82 school year. Mandhare brought suit against the school and the School Board alleging that the Board discriminated against her by denying her re-appointment as librarian at LaFargue Elementary School for the 1981-82 school year because of her national origin. The School Board countered her allegation with the assertion that Mandhare was not properly functioning as a primary school librarian because of her difficulty in communicating with young children. The pretrial order describes the contested issues of fact and law as whether defendants discriminated against plaintiff by denying her reappointment on account of national origin and whether basing such denial on plaintiff's inability to communicate well in English was pretextual. The pretrial order does not mention defendant's refusal to employ

plaintiff as an assistant librarian at East Thibodaux Junior High School or at any other junior high school in the LaFourche Parish school system.

The district court which tried the case without a jury found that the Board unlawfully discriminated against Mandhare because its articulated explanation for its refusal to follow Superintendent LeBlanc's recommendation was unworthy of credence. The court found the Board's reasoning pretextual since Mandhare's inability to communicate effectively would not bar her holding the junior high school position recommended by LeBlanc. In making this finding, the court relied on the assumption that the Board had never failed to follow the recommendations of Superintendent LeBlanc. The School Board was ordered to "reinstate" Mandhare to employment as a

librarian at a junior high school without back pay. The School Board appeals.

The Standard of review utilized by this court in a Title VII case that has been fully tried was stated in Lyford v. Schilling, 750 F.2d 1341, 1344 (5th Cir. 1985) (per curiam):

> [t]he three-step analysis of prima facie case, rebuttal, and showing of pretext defined by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) is not the proper method of evaluating such a case. Williams v. Southwestern Bell Telephone, 718 F.2d 715 (5th Cir. 1983) (citations omitted). As the Supreme Court stated in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983):
>
> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the

> rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." (citations omitted).

The McDonnel-Burdine method of analysis, which is applied to evaluate the proof in dispositions made at any preliminary or interim stage, does not apply to the review of fully tried cases. In the latter, the focus is on the "viability of the district court's ultimate conclusion regarding the presence or absence of discrimination." Hackett v. Housing Authority of City of San Antonio, 750 F.2d 1308, 1313 (5th Cir. 1985). This determination "is to be treated . . .in the same manner as any other issue of fact." Merwine v. Board of Trustees for State Institutions,

754 F.2d 631, 636 (5th Cir. 1985). (Citations omitted). Under Fed. R. Civ. P. 52 (a), the district court's factual findings control unless they are clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273 (1982).

The district court's determination that the Board had intentionally discriminated against Mandhare is clearly erroneous. The court focused on the wrong issue. It premised its conclusion on the Board's refusal to follow LeBlanc's recommendation that Mandhare be transferred to a junior high librarian position. That was not the issue as framed by the unamended pleadings and pre-trial order. Mandhare's action asserted discrimination in the Board's refusal to employ her as elementary school librarian, not their failure to

create and transfer her to a junior high position.

The record fails to sustain the contention that the Board's failure to hire Mandhare as junior high librarian was discriminatory. The fact that the Board had not previously refused a recommendation of reemployment by the Superintendent cannot be presumed to mean that it could not refuse to create a new position that did not exist anywhere in the system in order to comply with his recommendation. LeBlanc's previous recommendations to the Board which had been accepted all related to reemployment of individuals in existing positions. The parties agree that he had never recommended creation of a new position so that a teacher could be employed in a different job. The proof shows without dispute that Mandhare's appointment to a

new position as a librarian at East Thibodaux Junior High School was not approved by the Board because there was no opening at that school. Employing her as an assistant librarian would have entailed creation of a unique position solely for Mandhare.

The record contains no proof that the Board discriminated against Mandhare either in refusing to rehire her in the elementary school position for which she was not qualified or in refusing to create a new junior high school position for her. The judgment appealed from is reversed and the cause is remanded to the district court with directions to dismiss the action.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SULOCHANA MANDHARE	CIVIL ACTION
versus	NO. 83-1141
W.S. LAFARGUE ELEMENTARY SCHOOL, ET AL.	SECTION: E/3

REASONS FOR JUDGMENT

Plaintiff, Sulochana Mandhare, a female of Asian (India) origin, filed suit against defendants, W.S. Lafargue Elementary School, the LaFourche Parish School Board and the Parish of LaFourche, alleging that defendants discriminated against her by denying her re-appointment for the 1981-1982 school year because of her national origin, in violation of Title VII of the Civil Rights Act of 1964. At trial it was stipulated that the LaFourche Parish School Board is the proper defendant in this case. The School Board contends that plaintiff was terminated, or not re-employed because

her heavy accent and speech patterns and grammar problems prevented her from effectively communicating with primary school students.

Plaintiff obtained her Bachelor's of Arts degree and Bachelor's of Education degree in 1957 and 1964, respectively, in India and in 1972 she received a Master's of Education from Loyola University in New Orleans, Louisiana. In 1979 she received certification as a school librarian from Nichols State University at Thibodaux, Louisiana. Plaintiff served as a librarian at J.B. Maitland Elementary School for one year before she applied for employment as a librarian with the LaFourche Parish School Board, a school system which has direct jurisdiction over W.S. Lafargue Elementary School, it principal and teachers, and which employs more than

fifteen persons on a regular annual basis. Plaintiff was employed by the Board as a librarian at the W.S. LaFargue Elementary School during the school year of 1980-81. W.S. LaFargue Elementary School is an elementary school serving kindergarten through second grade.

In July 1981, plaintiff was notified that she would not be re-appointed for the 1981-82 school year because of her inability to communicate well in English. On August 11, 1981 plaintiff timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC), alleging discrimination based on national origin, Asian (India), and on December 9, 1982 the U.S. Department of Justice issued plaintiff a right to sue letter after a determination was made by the EEOC on August 31, 1982 that there was

reasonable cause to believe that the charge by plaintiff was true. Plaintiff timely filed suit on March 9, 1983.

Defendant's articulated basis for not renewing plaintiff's employment contract was that plaintiff had a communication problem because of her heavy accent and speech patterns which prevented her from effectively communicating with primary school students. Defendant explained that a part of plaintiff's job was to tell stories to the children and to introduce them to the library and her failure to master the English language inhibited her ability to perform these tasks. Defendant also explained that as a non-tenured teacher, plaintiff was under contract for a year at a time for three years and that within her year of employment with LaFargue Elementary she

was periodically observed and notified t that she needed to work on improving her English. Mr. Oneid Andras, the principal of LaFargue Elementary, prepared an evaluation of plaintiff based on these observations. In this evaluation Andras stated that plaintiff did an excellent job of organizing, categorizing and preparing library materials. He also stated that she needed to improve her English as students and teachers were having difficulty understanding her. Lastly, Andras stated that he believed plaintiff would do an excellent job at a school where her speech and story telling skills would not be so critical.

On April 30, 1981, Andras again evaluated plaintiff's skills and this time he recommended that she not be re-employed at LaFargue Elementary because her problems with speech and grammar made

it difficult for her to be understood by students and teachers. He again commented that he believed that plaintiff would do an excellent job at a school where her speech, grammar and story telling would not be so critical.

Jeffrey LeBlanc, Superintendent of Schools for LaFourche Parish, asked plaintiff to meet with him to discuss the possibility of her requesting a transfer. At the suggestion of LeBlanc, plaintiff requested that she be transferred to another school and LeBlanc recommended to the Board that plaintiff be appointed at Thibodaux Junior High School, as a librarian. Unfortunately, the School Board did not heed LeBlanc's recommendation and the Board voted not to appoint plaintiff. This was the first time the Board had not approved one of his recommendations for appointment. After going

into executive session, the Board reconvened in public session and accepted all listed appointments recommended by the Superintendent except the appointment of (p) (Exhibit P-4 at 6). No name was mentioned at the public session. The minutes of the meeting reflect that (p) was Mrs. Sulochana Mandhare. Testimony was adduced to the effect that the Board in executive session was concerned over plaintiff's possible communication difficulty with small children, notwithstanding the fact that her recommended appointment was to a Junior High School. There was other testimony to the effect that when plaintiff's name came up in this executive session someone mentioned that she was a foreigner and some people had a hard time understanding her. There was no testimony concerning the failure to state plaintiff's name and

prospective position when the Board resumed public session, a conspicuous sheepish action.

This court has jurisdiction of this case under 42 U.S.C. Sec. 2000(e) et seq. and 28 U.S.C. Sec. 1331. The defendant qualifies as an employer under 42 U.S.C. Sec. 2000 (e). The statutory conditions precedent to instituting this suit have been complied with by plaintiff.

The United States Court of Appeals, Fifth Circuit has set forth the requisites for evaluation of this case. In Lyford v. Schilling, 750 F.2d 1341, 1344 (5th Cir., 1985) the court states:

> " . . . Plaintiff misunderstands the nature of review given a Title VII case that has been fully tried on the merits. The three-step analysis of prima facie case, rebuttal, and showing of pretext defined by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93, S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Department of

Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is not the proper method of evaluating such a case. Williams v. Southwestern Bell Telephone Co., 718 F.2d 906, 908-09 (9th Cir. 1983). As the Supreme Court stated in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed 2d 403 (1983):

[W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnel-Burden presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." (citations omitted).

Once the parties have introduced all their evidence, the district court, as in every civil case, must decide whether plaintiff has proved by a pre-

> ponderance of the evidence that defendant violated Title VII by intentionally discriminating against her. This burden may be satisfied by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine 101 S.Ct. at 1095, quoted in Aikens, 103 S.Ct. at 1482."

Defendant's contention that its legitimate reason for plaintiff's termination or non-appointment was that she had a communication problem because of her accent which prevented her from effectively communicating with primary school students is a feigned contention. Plaintiff was not being considered for a position which would require such communication. She was to be appointed librarian at a Junior High School, a position for which it was established that she was eminently qualified.

The ultimate issue, discrimination vel non, is treated the same as any other issue of fact. Aikens, 103 S.Ct. at 1482. Defendant's explanation of its motivation is unworthy of credence. Plaintiff is entitled to relief.

42 U.S.C. Sec. 2000e-5 (g) provides in pertinent part that upon the finding of an unlawful employment practice, "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate, and that "[i]nterim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable." As stated by the Supreme Court in

Albemarle Paper Company v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), "it is also the purpose of Title VII to make persons whole in injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the court with full equitable powers."

In the instant case, the fashioning of an appropriate remedy for the defendant's unlawful discrimination against plaintiff presents an apparently unique problem. Plaintiff was non tenured and had she served that second year as librarian at a Junior High School the possibility remained that she might not have been recommended for re-appointment for a third year of employment. Further, she might not have been granted tenure after a third year.

Throughout these proceedings plaintiff has persisted in her desire to be reinstated.

Had plaintiff not so persisted the court would conclude that an award of back pay, at least for the 1981-82 school year subject to credits established by the evidence, would be consistent with the purposes of Title VII. Upon consideration, the Court concludes that a reasonable remedy consistent with the purposes of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination, and considering the relative merits and all aspects of this case, is to order reinstatement without back pay, in this manner. The LaFourche Parish School Board shall, for the 1985-86 school year, reinstate plaintiff to employment as librarian at a Junior High School, or with the mutual consent of the parties,

at any other type of school, within its school system. This employment shall be subject to the terms and conditions of plaintiff's initial employment by defendant and this employment shall be considered plaintiff's second year of employment in the defendant school system. Garza v. Brownsville Independent School Dist., 700 F.2d 253, 255 (5th Cir. 1983). The statute, 42 U.S.C. Sec. 2000e-5(g), does not provide that other equitable relief as the court may deem appropriate may be ordered in addition. It provides that such may be ordered in the alternative.

The statute does provide for prevailing party attorney's fees. 42 U.S.C. Sec. 2000e-5(k). At a subsequent hearing plaintiff's attorneys submitted materials relevant to such an award, their contemporaneous time records

and hours claimed. The court's discretion in awarding fees must be exercised within evidentiary bounds and in accord with the dicates of Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983). The ultimate goal is to award fees "adequate to attract competent counsel but which do not produce windfalls." Hensley, 103 S.Ct. at 1938 n.4 (quoting S. Rep. No. 94-1011, p. 6 (1976).

In this case plaintiff engaged the services of two attorneys, which has resulted in some duplicative effort and time expended, which will be adjusted accordingly. Defendant is not called upon to pay each attorney for performing services where the services of one would be sufficient. As a starting point the court will consider the number of hours reasonably expended on the litigation,

excluding those claimed but not reasonably expended, and multiply the result by a reasonable hourly rate. Hensley, 103 S.Ct. at 1939.

Plaintiff's exhibit Fee 1 received at the hearing on damages and attorney's consists of the contemporaneous time records of Ms. Dorothy Waldrup and that of Risley C. Triche, Esq., plaintiff's two attorneys. For the reasons explained, the Court will adjust these records, as follows:

Ms. Waldrup's items:

02-22-84	research, etc., from 6 to 2 hours, excessive;
02-23-84	editing, etc., from 3 to 1 hour, excessive;
02-28-84	depositions, etc., from 6 to 2 hours, duplicative;
12-04-84	preparation for trial, etc., from 5 to 0 hours, repetitious;
12-05-84	preparation for trial from 6 to 2 hours, excessive and repetitious;
12-05-84	trial preparation and court appearance, etc., from 10 to 4 hours, duplicative;

12-07-84 trial appearance, from 7 to 4 hours, duplicative;
01-10-85 review of case law, from 2 to 0 hours, excessive;
01-10-85 review of trial notes, etc., from 5 to 1 hour, excessive;
01-14-85 draft, etc., from 4 to 0 hours, excessive and cummulative 1-10-85 4 hour item.

This adjustment reduces the number of hours claimed by Ms. Waldrup from 157.80 to 119.80, which the court deems to be reasonable and proper.

Mr. Triche's items:

02-21-84 meeting with Dorothy Waldrup, from 6 1/2 to 0 hours, duplicative;
02-28-84 depositions in Thibodaux, from 3 1/2 to 2 hours, duplicative;
12-06-84 trial, etc., from 14 to 8 hours, duplicative;
12-07-84 trial, etc., from 8 1/2 to 6 hours, duplicative;
02-23-84
03-02-84
03-03-84 items for office employee
11-26-84 time are disallowed
12-03-84

This reduces the number of hours claimed by Mr. Triche from 89 hours to 73 1/2 hours, which the court deems to be reasonable and proper and to which will

be added the 4 1/2 hours claimed for 12-03-84 services by his associate attorney Mr. Bourgeois.

Having determined the number of hours reasonably expended the court must multiply that by a "reasonable hourly rate." Hensley, 103 S.Ct. at 1939. Reasonable fees "are to be calculated according to the prevailing market rates in the relevant community" that is "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, ____ U.S. ____, 104 S.Ct. 1541, 1547 & n. 11 (1984).

Criteria set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) were touched upon at the hearing on damages and attorney's fees and the court concludes that a reasonable hourly rate for the services of Ms.

Waldrup would be $90.00 and for Mr. Triche $100.00. The 4 1/2 hours claimed for 12-03-84 services by Mr. Triche's associate at $85.00 is appropriate. In making this conclusion the court has weighed the experience and reputation of the attorneys, the fact that Mr. Triche was lead trial counsel and has considered awards made in similar cases in this entire court.

Finally the court must consider the degree of success obtained that is, the extent to which plaintiff prevailed in the litigation. Hensley, 103 S.Ct. at 1938-1939, 1941. Where a plaintiff has been only partially successful, the court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." Hensley, 103 S.Ct. at 1941; Davis v. West Community Hospital, No. 83-1536, Slip. op. at 3228

(5th Cir. March 21, 1985). The court opts the latter and concludes that the award should be reduced 25%. Here plaintiff sought back pay, reinstatement, general and equitable relief and attorney's fees. Plaintiff did not prevail on that significant claim for relief, back pay, nor did she prevail on the request for general and equitable relief.

Thus, Ms. Waldrup would be entitled to an attorney's fee in the sum of $8,086.50 (119.80 x $90 - 25%) and Mr. Triche to an attorney's fee in the sum of $5,799.38 (73.5 x $100 + 4.5 x $85-25%).

Judgment will be entered in favor of plaintiff Sulochana Mandhare, and against defendant, LaFourche Parish School Board, directing that defendant, for the 1985-1986 school year reinstate plaintiff to

employment as a librarian at a junior high school, or with mutual consent of plaintiff and defendant, at any other type of school within defendant's school system, such employment to be subject to the terms and conditions of plaintiff's initial (1980) employment by defendant and such employment to be treated and considered plaintiff's second year of employment in the defendant school system. Further, that defendant pay plaintiff attorney's fees in the sum of $8,086.50 for services rendered by Ms. Dorothy Waldrup and $5,799.38 for services rendered by Risley C. Triche, Esq. Plaintiff shall recover costs of these proceedings.

New Orleans, Louisiana, March 29, 1985.

MARCEL LIVAUDAIS, JR.
United States District Judge

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW ORLEANS DISTRICT OFFICE
F. EDWARD HEBERT FEDERAL BUILDING
600 SOUTH STREET, ROOM 528
NEW ORLEANS, LOUISIANA 70130

Certified mail Nos. P 273 812 778, 79 & 80

Charge Number 062-81-1641

Sulochana Mandhare
200 Wisteria Drive
Thibodaux, LA 70301

Charging Party

W.S. LaFargue Elementary School
700 Plantation
Thibodaux, LA 70301

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The Charging Party alleged that the Respondent discriminated against her by denying her reappointment for the 1981-1982 school year because of her national origin, Asian (India). Examination of the evidence shows the following facts which indicate that there is reasonable cause to believe that the allegation is true:

1. The evidence of record shows that the Charging Party's qualifications are undisputed.

2. Witness testimonies refute the Respondent's position that the Charging Party did not communicate well in English.

3. The record reflects that the Respondent has hired no persons of Asian origin, other than the Charging Party as a full-time librarian. The Charging Party was replaced by a non-Asian.

The following reason for denying the Charging Party reappointment does not withstand scrutiny and is therefore, deemed pretextual:

The Charging Party did not communicate well in English.
No determination is made as to any other issue which might be construed to have been raised by the subject charge.

Having determined that there is a reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. The parties may indicate their willingness to enter into a settlement discussion by completing the enclosed invitation and return it to this office in the self-addressed envelope within ten (10) days of receipt of this letter.

On behalf of the Commission:

Date

Patricia T. Fields
District Director

Enclosures:
Invitation to Participate in Settlement Discussions
Notice of Conciliation Process
Self-Addressed Envelope

cc: Sidney A. Ordoyne, Jr.

Supreme Court, U.S.
FILED
OCT 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-342

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

SULOCHANA MANDHARE,
Petitioner

VERSUS

W. S. LAFARGUE ELEMENTARY SCHOOL, ET AL
Respondents

BRIEF ON BEHALF OF THE LAFOURCHE PARISH SCHOOL BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ralph R. Alexis, III
PORTEOUS, HAINKEL, JOHNSON & SARPY
704 Carondelet St.
New Orleans, LA 70130
(504) 581-3838

Attorney for Respondent

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Original unamended Complaint of Petitioner

STATEMENT OF THE CASE

This case involves a dispute between petitioner, Mrs. Sulochana Mandhare and the Lafourche Parish School Board. Mrs. Mandhare is of Asian origin. She was employed by the Lafourche Parish School Board as a librarian at the W.S. Lafargue Elementary School under a one year contract for the school year 1980-81. Plaintiff was not tenured.

The plaintiff's contract was not renewed for the next school year.

Plaintiff contended in her Complaint that although she was certified as a librarian she was not rehired by the Lafourche Parish School Board for the 1981-82 school year as an elementary school librarian and was intentionally discriminated against the Board solely because of her national origin.

Specifically, in her Complaint the plaintiff made the following allegations:

(1) Her primary job was to organize,

maintain and administer the library (at Par. 10);

(2) As a small part of her job according to her job description, she was asked to plan and present story hours for the children. This activity was to introduce and promote reading and diversify the school day for the children and to acquaint them with the library (at Par. II);

(3) During the time that she worked for the school system, the Principal, her immediate supervisor, never stated to her that she was not performing her duties as a librarian according to her job description (at Par. 12);

(4) As a newcomer to the Lafourche Parish School Board, she received very little information or instructions from her immediate supervisor (at Par. 13);

(5) She was also never evaluated by

fellow librarian...although evaluations are common and usually required for first year employees and requested by plaintiff (at Par. 13);

(6) At the end of 1981, she was terminated allegedly because she did not communicate well in English. According to her job description, a minor part of her job required oral communication to students (at Par. 14).

The School Board readily conceded that plaintiff had established a prima facie case of discrimination since she was obviously a member of a protected class, i.e., Asian, was qualified on paper to be a librarian, was not rehired and was replaced by a person not in a protected class.

However, the School Board contended it had a legitimate reason for not renewing Mrs. Mandhare's contract as librarian at W.S.

Lafargue, a school with grades kindergarten through second grade. Namely, she had a communication problem due to her heavy accent and speech patterns which prevented her from effectively communicating with the young children who were her students. At that age the librarian spends a large amount of time reading stories to the children or instructing the students in library skills. Thus, no one in a supervisory capacity responsible for observing or evaluating the performance of plaintiff--from the principal to the superintendent of schools--recommended her re-employment as a primary school librarian.

The superintendent ultimately recommended that a job of second librarian be created for plaintiff at a junior high school. No such position existed at the junior high school or any junior high school within the Lafourche Parish School system. Further, the superintendent's recommendation was due to a personal interest in petitioner.

The School Board did not renew plaintiff's elementary school contract for 1981-82 school year. In so acting the Board was motivated by the fact that plaintiff was not suited to act as a primary school librarian--the job she was originally contracted to perform. In fact, no one recommended her rehire at that position. As far as Superintendent's recommendation to appoint her to the position of junior high school librarian, the Board considered that there was no available librarianship at a junior high school to which plaintiff could be transferred. The Board did not feel it should create a position just for the plaintiff.

The School Board denied that discrimination based on national origin was the basis of the non-renewal of plaintiff's contract.

The trial judge found that the School Board's explanation of its motivation was "unworthy or credence". (See reasons for

Judgment, page 6). However, the trial judge erroneously and unexplainably attributed the Board'd explanation for not renewing her elementary school contract to the Board's action in not following the Superintendent's recommendation to appoint her as junior high school librarian.

As a result, the trial judge entered a judgment.

(1) Reinstating plaintiff as an employee of the School Board in the capacity of a librarian of a junior high school;

(2) Awarding attorney's fees of $13,885.88.

No back pay award was made.

The Lafourche Parish School Board appealed from that Judgment to the Fifth Circuit Court of Appeals.

The Fifth Circuit reversed. The Court found that the district court's ultimate determination was clearly erroneous. In so

doing, however, the Fifth Circuit did not tamper with the district court's underlying factual determinations; rather, it determined that the trial court focused on an issue not within the scope of the complaint or pre-trial order in making its ultimate finding of discrimination. Further, the Court of Appeals determined that based on the trial judge's findings, the evidence did not support the petitioner's allegations as set forth in her complaint.

SUMMARY OF ARGUMENT

The Fifth Circuit did not violate the parameters of Rule 52, Federal Rules of Civil Procedure in its reversal of the district judge's determination of the existence of discrimination.

The Court recognized that the District Court actually determined that there was no discrimination in the School Board's decision not to renew petitioner's contract as an elementary school librarian - which was the only issue to be decided in view of the unamended complaint and pre-trial order.

Further, the Court examined the Board's actions beyond the decision not to renew that contract, and found, based upon undisputed evidence, that there was no discrimination in those actions.

BRIEF IN OPPOSITION TO GRANTING OF WRIT

(1) The Court of Appeals did not substitute its own version of the facts for the findings of the trial court of otherwise violate Rule 52, Federal Rules of Civil Procedure.

In an overzealous effort to prove that the Fifth Circuit overstepped the bounds of proper judicial review petitioner first incorrectly summarizes her original Complaint by suggesting that the Complaint was "not limited to either the elementary or junior high librarian position but targeted to the fact she was not rehired".

Nothing could be further from the truth. We reproduce verbatim the relevant paragraphs of her Complaint, which is hereto attached:

> 7. Plaintiff, Sulochana Mandhare, is a resident of Lafourche Parish; she obtained her B.A. and B.Ed. in 1957 and 1964 respectively, in India and a masters of Education at Loyola University, New Orleans, Louisiana in 1972. She returned to school in 1978-79 and completed the necessary requirements to be granted certification as a schools librarian on September 6, 1979 at Nicholls State University.

8. Upon obtaining her certification as a librarian, plaintiff applied for and obtained employment at J.B. Maitland Elementary as a librarian in St. Mary Parish. She held that position for one year.

9. In 1980, plaintiff applied for a librarian's job with the Lafourche Parish School Board. She was hired for the 1980-81 school year and assigned to W.S. Lafargue Elementary School, a school in Lafourche Parish. The school consisted of grades kindergarten through second.

10. Plaintiff's primary job was to organize, maintain and administer the school's library. At the time she began work, that job was complicated as the school had recently added the second grade and this addition meant that the plaintiff was responsible for adding all the second grade books to the existing library as well as adding and cataloging all the audio/visual aids for the second grade. Plaintiff made orderly transition of the additional books and audio/visual aids adding them to the card-catalog and the accession record, opening the library on November 1, 1980 for the children.

11. As a small part of her job, according to her job description, plaintiff was

asked to plan and present story hours for the children. This activity was to introduce and promote reading and diversify the school day for the children and to acquaint them with the library.

12. During the time that plaintiff worked for the school system, the principal, her immediate supervisor, never stated to her that she was not performing her duties as a librarian according to her job description.

13. As a newcomer to the Lafourche Parish School Board, she received very little information or instruction from her immediate supervisor. She was also never evaluated from her immediate supervisor. She was also never evaluated by a fellow librarian, either in the first or second semester of employment, although evaluations are common and usually required for first year employees and requested by the plaintiff.

14. At the end of 1981, plaintiff was terminated allegedly because she did not communicate well in English. According to her job description, a minor part of her job required oral communication to students. Plaintiff alleges that defendant discriminated against her by denying her reappointment for the 1981-82

school year because of her national origin, Asian (India). (Emphasis supplied).

The trial centered completely on Mrs. Mandhare attempting to support her charges as alleged, and the School Board's defense of same.

Although not essential to a defense of such a claim, each and every allegation reproduced above was disproved by overwhelming and mostly uncontradicted evidence; to wit,

(1) In refutation of paragraphs 10, 11 and 12 of the Complaint, the Supervisor of School Libraries, State of Louisiana, as well as the Supervisor of Elementary Education for the defendant, as well as appellant's principal all testified that the ability to communicate verbally was a very important part of an elementary school librarian's job (only petitioner disputed this);

(2) In refutation of paragraph 12,

numerous observation forms and evaluation forms (and testimony in connection therewith including petitioner's own testimony) were introduced into evidence showing that her communication skills were called into question during the school year by her superiors;

(3) In refutation of paragraph 13, the Supervisor of School Libraries, State of Louisiana stated it was the practice throughout the state for principals to evaluate all teachers. There was no requirement that librarians evaluate librarians, etc. (All of the above refuted paragraph 14)

Although the appellant did produce two or three teachers who testified they had no trouble understanding appellant, the School Board produced evidence of numerous complaints to the principal that teachers and students

were having difficulty understanding her. (None of petitioner's witnesses challenged the good faith of respondent's witnesses).

Even one of petitioner's own witnesses, a former principal in another system, testified that he would have some hesitancy in recommending her because he himself had difficulty understanding her and knew that some teachers in his system had expressed the same sentiment.

The defendant School Board also introduced evidence as to how it handled the recommendation of appellant's principal not to rehire. That testimony was uncontroverted as follows:

Mrs. Mandhare's principal recommended that she not be rehired as an elementary school librarian. The Superintendent of Schools--purely out of compassion and mutual friendship--tried to help Mrs. Mandhare personally. He testified that he told her that she was not going to be rehired as an

elementary school librarian, "in spite of friendship". However, he told her that there may be a way to keep her employed in a position that did not require oral communication and teaching skills as did her previous position as a primary school librarian. Therefore, he told Mrs. Mandhare to request a transfer to a junior high school. He admonished her that there may not be a position available and that his plan to help her may not work. She agreed to the plan. The Superintendent subsequently recommended to the Lafourche Parish School Board that Mrs. Mandhare be rehired as a librarian at Est Thibodaux Junior High School. In fact, no position was available at that junior high school or at any other junior high school in the parish. In essence, the Superintendent recommended to the Board that a new position be created at that junior high school to accommodate Mrs. Mandhare. No other junior high school in the parish had a second

librarian. Although the School Board had always followed the Superintendent's personnel rehiring recommendations, he had never before recommended that the School Board create a job for someone. The Lafourche Parish School Board rejected the recommendation of Mr. LeBlanc and decided not to extend a new contract to Mrs. Mandara employing her as junior high school librarian.

The trial judge in his judgment implicitly recognized that appellant was not qualified to hold the position of elementary school librarian becase he did not order her reinstatement as such, and his ultimate finding of discrimination was in no way related to petitioner's stated complaint. In fact, the trial judge's Reasons for Judgment assumes the legitimacy of the Board's reasons for not renewing Mrs. Mandhare's contract as elementary school librarian:

> Defendant's contention that its legitimate reason for plaintiff's termination or non-appointment was that she had a communication problem

> because of her accent which prevented her from effectively communicating with primary school students is a feigned contention. Plaintiff was not being considered for a position which would require such communication. She was to be appointed librarian at a junior high school, a position for which it was established that she was eminently qualified.
>
> (Reasons at page 6)

The Court's holding of discrimination, unfortunately, was the epitome of fallacious reasoning. It set up a straw man easily knocked down to support its judgment.

In order to fully understand the illogic and patent unfairness of the trial judge's finding, one must remember that plaintiff's Complaint in its entirety, charged the School Board with discrimination based on the premise that she was qualified to serve as a primary school librarian. The Pre-Trial Order did not enlarge these allegations. The plaintiff produced witnesses in alleged support of this position.

Therefore, the Board was required to

articulate legitimate reasons to explain its action and defend itself against these contentions, i.e. present evidence of its observations and evaluations of plaintiff and her problems with verbal communication.

At no time did the School Board contend that Mrs. Mandhare was not extended a contract as a junior high school librarian solely because of her inability to communicate effectively in English with children in kindergarten through first grade. This was an entirely separate event.

The Superintendent's recommendation of Mrs. Mandhare's appointment to the junior high school was not approved by the Board because of the following undisputed facts: first, there was no opening for a librarian at the school; second, to employ her at the school would have entailed creation of a position solely for Mrs. Mandhare--and no junior high school in the system employed two librarians.

In its reversal, the Fifth Circuit did

not, as suggested by appellant, invade the district judge's domain of determining credibility of witnesses or substitute its own judgment on subsidiary fact findings. In fact, we suggest that the Fifth Circuit tampered with none of the district court's underlying factual determinations. The Court correctly held that the trial court's ultimate holding of discrimination was clearly erroneous, based on fallacious reasoning and involved consideration of issues not contained in the pleadings or Pre-Trial Order.

In holding that the record contained no proof that "the Board discriminated against Mandhare....in refusing to rehire her in the elementary school position....the Fifth Circuit was merely stating the obvious. The trial judge in his opinion implicitly recognized that fact. His opinion no where states that Mrs. Mandhare was qualified to be an elementary school librarian. It makes specific mention that the judgment was

premised on the fact that "Plaintiff was not being considered for a position which required such communication." The Fifth Circuit in effect held that the Court should have terminated its inquiry at this point, and not considered the Board's actions beyond this point.

> (2) Petitioner ultimately seeks a holding of this Court That where an Individual is qualified to perform a job and Applies for Employment, a job must be created to Employ the Individual.

In holding that there was "no proof that the Board discriminated against Mandhare...in refusing to create a new junior high school position for her" the Fifth Circuit against disturbed no underlying factual determination of the district judge.

The Court of Appeals simply recognized the patent error of the trial judge in making an ultimate finding of discrimination by misstating the contentions of the School Board and by suggesting that the reasons advanced by

the School Board to rebut petitioner's claim that she was qualified to be an elementary school librarian, i.e., poor communication skills, were the same reasons for the Board's decision not to extend her a contract as a junior high school librarian.

The Court of Appeal assumed Mrs. Mandhare would be qualified to hold the position of junior high school librarian, and, indeed, this fact was not contested at trial. Having assumed arguendo, Mrs. Mandhare's qualifications, the Court recognized these undisputed facts: First, there was no opening at the school recommended by the Superintendent. Second, the recommendation of the Superintendent would entail creation of a position of assistant librarian--a position which did not exist at that school or at any junior high in the system--just for Mrs. Mandhare. The Board had never before created a job for an individual at the request of the Superintendent.

The Court recognized in its holding that the Board was under no legal obligation to create a job for Mrs. Mandhare.

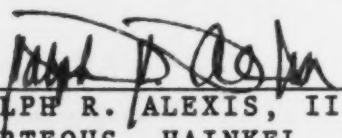
Indeed, petitioner seeks ultimately to have this Honorable Court issue an unprecedented holding; to wit, where a qualified person applies for a job--even if the job does not exist--a position must be created to employ the individual.

The Fifth Circuit acted properly in refusing to set such a precedent.

CONCLUSION

For the reasons set forth above, this Court should deny petitioner's Petition.

Respectfully submitted,



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FILED
U.S. DISTRICT COURT
EASTERN DIST. OF LA
MAR 9 3 45 PM '83
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SULOCHANA MANDHARE PLAINTIFF	*	CIVIL ACTION
VERSUS	*	NUMBER 83-[illegible]
W.S. LaFARGUE ELEMENTARY SCHOOL, THE LAFOURCHE PARISH SCHOOL BOARD AND THE PARISH OF LAFOURCHE DEFENDANTS	*	SECTION SECT. E MAG. [illegible]

* * * * * * * * * * * * * *

COMPLAINT

I.

1. This is a suit seeking redress for national origin discrimination in employment under the Civil Rights Act of 1964. This Court has jurisdiction under 42 U.S.C. §2000e-2(a)(1) and 28 U.S.C. §1331.

II.

PARTIES

2. Sulochana Mandhare is an adult female of Asian origin who has resided in the United States for 18 years. She is domiciled in Thibodaux, Louisiana. She was employed by the Lafourche Parish School Board as a librarian at the W.S. LaFargue Elementary School during the school year 1980-81.

$60.00

3. W.S. LaFargue Elementary School, defendant, is an elementary school serving grades kindergarten through second, it is within the Lafourche Parish School system, Lafourche Parish, Louisiana.

4. The Lafourche Parish School Board, defendant, is a school system who has direct jurisdiction over the W.S. LaFargue Elementary School, its principal and teachers.

5. The Parish of Lafourches, defendant, is, on information and belief, the employer of all teachers and principals in the Lafourche Parish School System.

6. Defendants employ more than 15 persons and are "employers" within the meaning of 42 U.S.C. §2000e(b).

STATEMENT OF FACTS

7. Plaintiff, Sulochana Mandhare, is a resident of Lafourche Parish; she obtained her B.A. and B.Ed. in 1957 and 1964 respectively, in India and a masters of Education at Loyola University, New Orleans, Louisiana in 1972. She returned to school in 1978-79 and completed the necessary requirements to be granted certification as a schools librarian on September 6, 1979 at Nicholls State University.

8. Upon obtaining her certification as a librarian, plaintiff applied for and obtained employment at J.B. Maitland Elementary School as a librarian in St. Mary Parish. She held that position for one year.

9. In 1980, plaintiff applied for a librarian's job with the Lafourche Parish School Board. She was hired for the 1980-81 school year and assigned to W.S. LaFargue Elementary School, a school in Lafourche Parish. The school consisted of grades kindergarten through second.

10. Plaintiff's primary job was to organize, maintain and administer the school's library. At the time she began work, that job was complicated as the school had recently added the second grade and this addition meant that plaintiff was responsible for adding all the second grade books to the existing library as well as adding and cataloging all the audio/visual aids for the second grade. Plaintiff made orderly transition of the additional books and audio/visual aids adding them to the card-catalog and the accession record, opening the library on November 1, 1980 for the children.

11. As a small part of her job, according to her job description, plaintiff was asked to plan and present story hours for the children. This activity was to introduce and promote reading and diversify the school day for the children and to acquaint them with the library.

12. During the time that plaintiff worked for the school system, the principal, her immediate superior, never stated to her that she was not performing her duties as a librarian according to her job description.

13. As a newcomer to the Lafourche Parish School Board, she received very little information or instructions from her immediate superior. She was also never evaluated by a fellow librarian, either in the first or second semester of employment, although evaluations are common and usually required for first year employees and requested by the plaintiff.

14. At the end of 1981, plaintiff was terminated allegedly because she did not communicate well in English. According to her job description, a minor part of her job required oral communication to students. Plaintiff alleges that defendant discriminated against her by denying her re-appointment for the 1981-82 school year because of her national origin, Asian (India).

EXHAUSTION OF REMEDIES

15. Plaintiff filed a charge of discrimination against defendants with the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") on August 11, 1981. The Right to Sue Letter was issued on December 9, 1982 by the U.S. Department of Justice. A determination was made by the EEOC on or about August 31, 1982 that there was reasonable cause to believe that the charge by plaintiff was true.

VIOLATION OF LAW

16. The acts of W.S. LaFargue Elementary School, the Lafourche Parish School Board and the Parish of Lafourche constitutes national origin discrimination within the meaning of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.

CAUSE OF ACTION

17. Defendants denial of re-appointment of plaintiff constitutes discrimination on the basis of national origin; a violation of plaintiff's rights under the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.

RELIEF

WHEREFORE, plaintiff prays that this Court:

a. Award to plaintiff back pay to compensate for discrimination and interest.

b. Award attorney's fees and costs.

c. Award reinstatement of plaintiff to her position as librarian at W.S. LaFargue Elementary School or a comparative job in the school system.

d. All general and equitable relief.

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PLEASE SERVE THE DEFENDANTS,
W.S. LaFARGUE ELEMENTARY SCHOOL,
THE LAFOURCHE PARISH SCHOOL BOARD
AND THE PARISH OF LAFOURCHE
THROUGH: RICHARD EGLE
POLICE JURY PRESIDENT
corner of West 2nd & Green Streets
Thibodaux, Louisiana